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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

AMERICAN TRUCKING ASSOCIATIONS, INC., APPELLANT,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, ET AL., APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO DISMISS OR IN THE ALTERNATIVE TO AFFIRM

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INDEX

PAGE

STATEMENT 1

ARGUMENT 3

1. Special Circumstances 5

2. Appellant's Lack of Standing 11

CONCLUSION 12

CERTIFICATE OF SERVICE 13

CITATION OF AUTHORITIES

American Trucking Associations v. United States, 144 F. Supp. 365 (1956) 6

American Trucking Associations v. United States, 355 U.S. 141 (1957) 7

American Trucking Associations v. United States, 364 U.S. 1 (1960) 9, 10

Burlington Truck Lines, Inc. — Purchase — Pirnie, 85 M.C.C. 363 (1960) 9

Quickie Transport Company v. United States, 169 F. Supp. 826 (1959), affirmed 361 U.S. 36 (1959) 11

Rio Grande Motor Way, Inc.—Control and Merger—Carbon Motorway, Inc. 90 M.C.C. 643, 649-650 (1963) 9

Rock Island Motor Transit Company—Common Carrier Applications, 63 M.C.C. 91 (1954) 5

United States v. Rock Island Motor Transit Co., 340 U.S. 419 (1950) 5

No. 1046

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MOTION TO DISMISS OR IN THE ALTERNATIVE TO AFFIRM

The Rock Island Motor Transit Company (hereinafter referred to as "Motor Transit"), one of the appellees in the above-entitled matter, moves that this appeal be dismissed because of appellant's lack of standing or, in the alternative, that the final judgment of the District Court be affirmed on the ground that the questions presented are so unsubstantial as not to warrant further argument.

STATEMENT

This is a direct appeal from the final judgment by a District Court of three judges specially constituted pursuant to 28 U.S.C. §§ 1336, 1398, 2284, 2321-2325, dismissing appellant's complaint which sought to set aside an order of the Interstate Commerce Commission.

The order of the Commission under attack granted to Motor Transit authority to serve the site of a new Eastman Kodak Company plant located at Oakbrook, Illinois, 2½ miles beyond the western limits of the Chicago Commercial Zone. The Commission found that "special circumstances" were present in the proceeding which supported and justified the grant of unrestricted motor carrier authority to Motor Transit.

Eastman requested Motor Transit and other motor carriers serving its old plant at Chicago to seek authority from the Commission to serve the new plant site. Thirty applications by these carriers under Section 206 of the Interstate Commerce Act, 49 U.S.C. 306, were filed, including 28 by independent motor carriers and two by motor carriers affiliated with railroads, including Motor Transit.

A hearing was held at Chicago on a consolidated record for all applicants before the Commission at which no applicant opposed any other applicant and Eastman appeared and introduced the same evidence in support of all applicants. The examiner recommended the grant of all the independent motor carrier applications (27 of which resulted in certification) but he recommended against the grant of authority to both rail affiliates. Exceptions were filed to the examiner's report to which appellant made reply. Thereafter the Operating Rights Review of the Commission affirmed the examiner's recommendations and rejected the instant application. Motor Transit filed a petition for reconsideration to which appellant made reply. By a report served June 28, 1963, Division 1 of the Commission found that public convenience and necessity require a grant of the application to Motor Transit. Subsequently, on April 8, 1964, the Commission issued to Motor Transit its certificate authorizing unrestricted service to and from the Eastman

plant at Oakbrook under Section 207 of the Interstate Commerce Act, 49 U.S.C. 307.

In the meantime, appellant, the only real protestant to the grant of authority before the Commission, filed a petition for reconsideration which was denied by the Commission as was appellant's petition for a finding that the proceeding involved an issue of general transportation importance. Appellant, still acting alone, then filed a complaint in the United States District Court for the District of Columbia during the pendency of which the Commission reopened the proceedings on its own motion and by its report served July 7, 1965, reaffirmed the grant of authority to Motor Transit. Appellant's further appeals to the Commission were of no avail and on December 13, 1965, it filed a supplement to its complaint before the District Court to which Motor Transit filed its answer as an intervening defendant.

The court below held unanimously that the Commission correctly concluded that special circumstances were present in this proceeding which amply justified the grant of Motor Transit's application. On that basis it dismissed the complaint insofar as Motor Transit is concerned (Jur. St., p. 29). The court below was also impressed with the argument of the Interstate Commerce Commission that appellant had no standing to attack the Commission's order in this proceeding, the court stating that if the question were open it would be inclined to hold that the appellant lacked standing (Jur. St., p. 24).

ARGUMENT

Although appellant's statement of the questions presented is set forth in three paragraphs, the statement in fact raises only a single question for review insofar as Motor Transit is concerned. That is, whether the Interstate Commerce

Commission properly exercised its discretion in finding that special circumstances were present in the instant proceeding justifying an unrestricted grant of motor carrier authority to this appellee.

A minimal amount of authority was sought by Motor Transit in this proceeding. It already possessed full motor carrier rights in the territory between Omaha and Chicago. Its trucks entered Chicago over U. S. Highway No. 34 which runs immediately adjacent to Oakbrook, a community 2½ miles west of Chicago. The authority granted by the Commission simply permits Motor Transit trucks to handle shipments at the Eastman plant at Oakbrook which became a point intermediate between Chicago and Omaha on Motor Transit's authorized route.

At the hearing before the Commission appellant and an independent motor carrier, Consolidated Freightways, opposed the rail affiliates but not the companion applications of the other motor carriers. The protest of Consolidated Freightways was directed primarily at the application of the other rail affiliate in this proceeding, New York Central Transport, and it withdrew its protest when that carrier offered a restrictive amendment to its application (Jur. St., p. 32). Consolidated Freightways has not participated in the proceeding since the hearing and its protest must be deemed a mere matter of form in this case. Only appellant contests the decision of the Commission and appellant offered no evidence at the hearing.

As seen in appellant's Jurisdictional Statement at page 38, the Commission's decision in this matter reviews the facts of record setting forth the basic findings which led to the ultimate conclusion that there were special circumstances present in this proceeding which supported the grant of authority. Thus, it was shown that the supporting shipper, Eastman, required the continued transportation

services provided by Motor Transit; that no motor carrier effectively opposed the grant of authority; that there was no indication that any motor carrier is able or willing to serve the points which Motor Transit had been serving in the past; and that Eastman would be deprived of a transportation service it had enjoyed in the past and needed for proper utilization of its new Oakbrook facility if Motor Transit's application were denied. Of particular significance is the Commission's finding that since Motor Transit had been serving Eastman at Chicago, the proposed service at Oakbrook would not constitute a new service nor would it inject "a new quantum of competition detrimental to those independent motor carriers which also have been serving Eastman's Chicago plant and which do not oppose the issuance of authority to Motor Transit" (Jur. St., p. 37).

1. Special Circumstances.

It was in this very territory that the law in this field was established by the Commission with approval of the courts. We refer to *Rock Island Motor Transit Company—Common Carrier Applications,* 63 M.C.C. 91 (1954), commonly referred to as the *Second White Line* or *Rock Island Case**. In that proceeding Motor Transit sought unrestricted authority to render motor carrier service between Chicago and Omaha. Although vigorously opposed by independent motor carriers, the Commission granted the application because there were present in the proceeding special circumstances which warranted the grant of unrestricted authority to this rail affiliate. The application covered the territory between Chicago and Omaha. However, the Commission found that Motor Transit already possessed unrestricted

* The *First White Line* or *Rock Island Case* also involved the imposition of restrictions on Motor Transit's operating authority in this area, *United States* v. *Rock Island Motor Transit Co.,* 340 U. S. 419 (1950).

authority between Chicago and Silvis,* Illinois and consequently the new authority covered the segment between Silvis and Omaha, 63 M.C.C., 108.

The order was attacked in the District Court by nine independent motor carriers, as well as by appellant and its Regular Common Carrier Conference, in *American Trucking Associations v. United States*, 144 F.Supp. 365 (1956). The ground urged for reversal was that the Commission did not have power to grant unrestricted certificates to rail affiliates but only certificates restricted to service auxiliary to and supplemental of rail service because of the limitations in Section 5(2)(b) of the Interstate Commerce Act. The District Court rejected this contention in an opinion by Circuit Judge Prettyman who said as follows at page 367:

> "Plaintiffs say that the requirement which appears in Section 5(2)(b) must be read into Section 207(a) and therefore controls in the issuance of certificates where a railroad, or its subsidiary, is the applicant. The Commission says the requirement is notably omitted from the terms of Section 207(a); that the policy, not the terms of the requirement applies to the issuance of certificates under 207(a). It says a policy requirement is not so rigid as a flat requirement in terms but is flexible and permits a grant in exceptional circumstances where the Commission finds that the public interest, convenience and necessity require the grant.
>
> "We agree with the contention of the Commission in the foregoing respect. The case concerns the issuance of a certificate. Certainly the terms of the requirement as to auxiliary and supplementary service do not appear in Section 207(a). It is equally certain that the policy of the requirement, being a basic policy in the statute, does apply. The difference between a rigid requirement and an applicable policy is one of flexibility and permits the Commission to be governed in exceptional circumstances by the needs of the public convenience and necessity."

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* Near the Mississippi River in the area of Davenport, Rock Island and Moline.

On appeal this decision was upheld by this Court in the landmark case involving a grant of unrestricted motor carrier authority to a rail affiliate, *American Trucking Association* v. *United States,* 355 U.S. 141 (1957). The following statement of the law applicable in matters of this nature appears in the opinion of Mr. Justice Clark:

> "In interpreting Section 207, the Commission has accepted the policy of Section 5(2)(b) as a guiding light, not as a rigid limitation. While it has applied auxiliary and supplementary restrictions in many Section 207 proceedings, the Commission has occasionally issued certificates to railroad subsidiaries without the restrictions where "special circumstances" prevail, namely, where unrestricted operations by the rail-owned carrier are found on special facts and circumstances to be in the public interest. • • •
>
> "We conclude, therefore, that the Congress did not intend the rigid requirement of Section 5(2)(b) to be considered as a limitation on certificates issued under Section 207." (355 U.S., 149-150)

There is no question, therefore, but that the Commission may authorize an unrestricted grant of authority if special circumstances warranting such action are present.

The special circumstance thought important in the *Second White Line* or *Rock Island Case* was the inadequacy of the service performed in the territory by independent motor carriers. That such service is inadequate in the instant proceding is taken from the testimony of Eastman witnesses at the hearing who stated that the shipper needed the continued transportation services of the motor carriers which had been serving it at its Chicago plant, including Motor Transit.

An example of this testimony is found in the evidence of witness James A. Hill, General Manager of the Midwestern

Sales Division of Eastman at Chicago, who said in Exhibit 1 at pages 7-8 as follows:

> "• • • Without the trucking facilities that are now available to us at our old location, our service would be seriously hindered. One line delivery is exceedingly important in order to obtain the type of service that we have been used to extending to our dealers. For this reason, we probably use more truck lines than most companies of comparable size.
>
> • • •
>
> "• • • We sell and ship to customers located in practically every city, town, and hamlet in the Midwest. No rail facilities are available, necessary, or anticipated in the Oakbrook area, so it is essential that we continue receiving the same fine service from our present truckers that we have been receiving over the many years that we have used their facilities, both inbound and outbound."

No such testimony would have been proffered by the shipper if in fact other motor carriers could or would properly serve the new facility at Oakbrook.

More important, perhaps, is the circumstance that in the *Second White Line* or *Rock Island Case* there was strong motor carrier opposition to Motor Transit's efforts to operate free of restrictions. No such opposition is present in the instant proceedings. If Motor Transit's entry into Oakbrook had presented a threat to any independent motor carrier, such carrier would have effectively protested such entry. Failure so to protest leads to the conclusion that either there were no carriers serving Motor Transit's authorized points or that if any such carriers exist they are not concerned about a 2½ mile extension of Motor Transit's authority.

While the presence of opposition in this type of proceeding does not necessarily negative special circumstances,

lack of opposition is a special circumstance warranting grant of authority. In *Burlington Truck Lines, Inc.—Purchase—Pirnie,* 85 M.C.C. 363 (1960), the Commission made these observations at pages 372-373:

> "The general principle of the *White Line* case, that the motor-carrier operating rights of a railroad or its affiliate should usually be restricted solely to a service "auxiliary to and supplemental of" train service of the railroad, has as its primary objective the protection of competing motor carriers from the dual competition of an all-motor service in addition to the rail service. *It is, therefore, a circumstance of considerable importance in a proceeding such as this that the application is not opposed by competing motor carriers to any real extent,* and not at all on the ground that the operating rights to be purchased should be restricted solely to an "auxiliary and supplemental" service. *This record indicates in a general way that many other motor carriers operate in the area served by vendor, but they did not see fit to intervene in the proceeding;* and the record is devoid of details as to the nature and scope of their service, the actual competition, if any, which they provide to vendor, or the extent to which they would be able to absorb and transport efficiently that portion of the traffic, now transported by vendor, which Truck Lines would not be able to transport if these rights were restricted to an 'auxiliary and supplemental' service." (Emphasis supplied)

See also *Rio Grande Motor Way, Inc.—Control and Merger—Carbon Motorway, Inc.,*—90 M.C.C. 643, 649-650 (1963).

Appellant misplaces reliance on two opinions of this Court in support of its appeal. As already seen, in the *Second White Line or Rock Island Case,* the Court sustained the grant of full motor carrier authority to Motor Transit over the objection of appellant and independent motor carriers. In the second opinion relied upon, *Pacific Motor, (American*

Trucking Associations v. *United States,* 364 U.S. 1 (1960), the rail affiliate's application was also opposed by appellant as well as its Contract Carrier Conference, the National Automobile Transporters Association, and six motor carriers. In overturning an award to Pacific Motor the Court cited the Commission's lack of finding that independent motor carriers were unable or unwilling to perform a service as an example of insufficient justification for the award. Such holding, however, does not purport to place the Interstate Commerce Commission in a straight jacket nor to limit nor delineate precisely the discretion of the Commission in determining what are or what are not special circumstances in any particular proceeding (364 U.S., 18).

Whereas independent motor carriers were opposed to the rail affiliate in both the *Second White Line* or *Rock Island Case* and in *Pacific Motor,* no such opposition was present in the instant proceeding. Not only did the independent motor carriers fail effectively to oppose the grant of unrestricted authority, but such grant involves a point, Oakbrook, intermediate on Motor Transit's previously authorized routes. Motor Transit did not seek to provide a new service nor did its proposal inject a new quantum of competition detrimental to independent motor carriers also serving Eastman's Chicago plant.

Beyond these circumstances, we point to other facts in this proceeding which also qualify as "special" in any application of Commission policy in this field. The very history of Motor Transit's operation in this territory must be considered a special circumstance. It was in this very area that the test of special circumstances was laid down in the *Second White Line* or *Rock Island Case* and an associated proceeding before the Commission, MC 29130, Sub 83 now designated Sub 1. Motor Transit has been operating into Chicago without restrictions since 1938. Thus, there is in-

volved only a minimal extension of previously authorized operations.

Finally, the desires of the shipper for continued service by Motor Transit at the new location at Oakbrook presents a special circumstance. The transportation of photographic equipment requires expedited and careful handling which makes necessary the continuation of Motor Transit's services which have been adequately and satisfactorily performed in the past and which should be continued in the future.

The instant case is similar to *Quickie Transport Company* v. *United States,* 169 F.Supp. 826 (1959), affirmed 361 U.S. 36 (1959), wherein the District Court upheld the grant of authority to four independent motor carriers which had been serving a shipper in one location and were certificated by the Commission to continue such service at a new location ten miles away.* The court said at page 829:

> "It seems reasonable to us for the Commission to conclude, in the light of these unchallenged facts, that the 4 regularly licensed carriers now serving the Twin Cities area should have their authority extended to cover the Pine Bend area. *In effect, this is merely a geographical enlargement of the Twin Cities shipping zone to serve approximately the same amount of traffic.*" (Emphasis supplied)

2. Appellant's Lack of Standing.

The court below was impressed with the argument presented to it by the Commission, asserting that appellant had no standing to bring this suit (Jur. St., p. 24). We are informed that the Commission will again plead appellant's lack of standing in this Court. We join in such motion and consider it unnecessary to argue the matter further here.

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* Special circumstances were not involved.

We also refer to Motor Transit's answer to the original complaint filed in the court below wherein it was asserted that Motor Transit is a member of American Trucking Associations, Inc. Further examination discloses that appellant is an association of associations and that at no time material herein has Motor Transit been a member, as such, of American Trucking Associations, Inc.

CONCLUSION

The appeal should be dismissed or, in the alternative, the judgment of the United States District Court for the District of Columbia should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Martin L. Cassell, one of the attorneys for The Rock Island Motor Transit Company, appellee herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 10th day of April, 1967, I served copies of the foregoing Motion on the several parties hereto, as follows:

1. On the United States of America, by mailing copies in duly addressed envelopes, with air mail postage prepaid, to Honorable Thurgood Marshall, Solicitor General, Honorable Donald F. Turner, Assistant Attorney General, Howard E. Shapiro, Esq., Richard A. Wegman, Esq. and Jerry Z. Pruzansky, Esq., Department of Justice, Washington, D. C. 20530; and David G. Bress, United States Attorney for the District of Columbia, U.S. Courthouse, Washington, D.C. 20001.

2. On the Interstate Commerce Commission, by mailing copies, in duly addressed envelopes, with air mail postage prepaid, to Robert W. Ginnane, Esq., its General Counsel and Leonard S. Goodman, Esq., its Assistant General Counsel, at the offices of the Commission, Washington, D. C. 20423.

3. On American Trucking Associations, Inc., appellant, by mailing copies in duly addressed envelopes, with air mail postage prepaid, to its counsel of record, Peter T. Beardsley, Esq., Richard A. Mehley, Esq., and Harry J. Jordan, Esq., 1616 P Street, N.W., Washington, D. C. 20036.

4. On New York Central Transport Company, intervening defendant below, by mailing copies in duly addressed envelopes, with air mail postage prepaid, to its counsel, Gerald E. Dwyer, Esq. and Kenneth H. Lundmark, Esq., 466 Lexington Avenue, New York City, New York 10017.

MARTIN L. CASSELL